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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 BRIAN MOFFITT,) No. EDCV 11-1469-JST(CW)¹
13)
14 Petitioner,)
15) ORDER DISMISSING PETITION
16 v.) FOR WRIT OF HABEAS CORPUS
17 PATTON STATE HOSPITAL,) (28 U.S.C. § 2254)
18 Respondent,)
19 _____)
20

21 For reasons stated below, the petition is dismissed without
22 prejudice.
23

24 **BACKGROUND**

25 The pro se petitioner is in custody at Patton State Hospital, in
26 Patton, California, in this district. On September 14, 2011,
27 Petitioner filed a petition for writ of habeas corpus. [Docket no.
28 1.] In a minute order filed October 13, 2011 (docket no. 5), the
court found the petition subject to dismissal, on its face, for the
following reasons, as stated in the minute order:

¹ Petitioner also has another habeas action pending in this
court: Moffitt v. Patton State Hospital, No. EDCV 11-1297-AHS(CW).

- (a) Petitioner is in state custody, but it is not clear whether he is challenging the legality of that custody in this purported habeas petition under 28 U.S.C. § 2254, and he has not identified the nature of the custody. There are two statutes under which a person may challenge the legality of state custody in a habeas action in federal court. A person in custody under a state court judgment may proceed under 28 U.S.C. § 2254; a person in state custody under some basis other than a state court judgment may proceed under 28 U.S.C. § 2241. See Stow v. Murashige, 389 F.3d 880, 886 (9th Cir. 2004); White v. Lambert, 370 F.3d 1002, 1006 (9th Cir. 2004); McNeely v. Blanas, 336 F.3d 822, 824 n.1 (9th Cir. 2003). Because Petitioner has not made clear the nature of his custody, it is not clear whether this action falls under § 2254 or § 2241.
- (b) Petitioner has not established personal jurisdiction by naming a proper respondent (normally a specific official, such as a warden or director, with the power to order Petitioner's release). 28 U.S.C. § 2242; 28 U.S.C. § 2254, Rule 2.
- (c) Petitioner has not shown that he has exhausted available state court remedies. For § 2254 petitions the exhaustion requirement is defined at 28 U.S.C. § 2254(b)-(c). For § 2241 petitions by persons in state custody there is a common law exhaustion requirement. See, e.g., McNeely, 336 F.3d at 825-26.
- (d) Petitioner has not clearly stated a claim that he is in

1 custody in violation of the constitution, laws, or
2 treaties of the United States. 28 U.S.C. §§
3 2241(c)(3), 2242, 2254(a). In fact, it is not clear
4 whether Petitioner is seeking to challenge the legality
5 of his custody as such (that is, the fact or duration
6 of his custody), or conditions of confinement. If
7 Petitioner seeks to challenge conditions of confinement
8 he should file a civil rights complaint under 42 U.S.C.
9 § 1983, not a habeas corpus petition under 28 U.S.C. §
10 2254 or 2241.

11 This is the fifth deficient habeas petition Petitioner
12 has submitted to this court, and Petitioner has been
13 repeatedly advised of the requirements for filing and
14 litigating a habeas corpus petition in federal district
15 court. See Nos. EDCV 05-1084-AHS(CW), EDCV 08-1427-AHS(CW),
16 EDCV 10-854-AHS(CW), and EDCV 11-1297-AHS(CW).

17 [Docket no. 5.]

18 The court ordered Petitioner to show cause, on or before November
19 14, 2011, why the petition should not be summarily dismissed for the
20 reasons stated above, with detailed instructions on how to correct the
21 facial defects in the petition. [Id.] The court also informed
22 Petitioner that, if he could satisfy the stated conditions, the court
23 would grant him leave to file an amended petition, but that, if he did
24 not comply with the order to show cause, his action would be subject
25 to dismissal for failure to prosecute, as well as for the reasons
26 stated above. Petitioner has not complied with the order to show
27 cause, and the time allotted for doing so has expired.

DISCUSSION

It is well established that district courts have authority to dismiss actions for failure to prosecute or to comply with court orders. Fed. R. Civ. P. 41(b); Link v. Wabash Railroad Co., 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)(authority to dismiss for failure to prosecute necessary to avoid undue delay in disposing of cases and congestion in court calendars); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992)(district court may dismiss action for failure to comply with any court order).

In deciding whether to dismiss for failure to prosecute or to comply with court orders a district court must consider five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Omstead, 594 F.3d at (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)); see also In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994)(failure to prosecute); Ferdik, 963 F.2d at 1260-61 (9th Cir. 1992)(failure to comply with court orders).

In the present action, the first two factors -- public interest in expeditious resolution of litigation and the court's need to manage its docket -- weigh in favor of dismissal. Petitioner has not responded to the court's order to show cause despite being warned of the consequences of such failure. This hinders the court's ability to move this case toward disposition, and suggests that Petitioner does not intend to litigate this action diligently.

The third factor -- prejudice to the opposing parties -- also weighs in favor of dismissal. A rebuttable presumption of prejudice

1 arises when a petitioner unreasonably delays prosecution of an action.
2 See Eisen, 31 F.3d at 1452-53. Nothing suggests that such a
3 presumption is unwarranted in this case.

4 The fourth factor -- public policy in favor of deciding cases on
5 the merits -- ordinarily weighs against dismissal. However, it is
6 Petitioner's responsibility to move towards disposition at a
7 reasonable pace, and avoid dilatory and evasive tactics. See Morris
8 v. Morgan Stanley, 942 F.2d 648, 652 (9th Cir. 1991). Petitioner has
9 not discharged this responsibility, despite having been instructed on
10 his responsibilities, granted sufficient time in which to discharge
11 them, and warned of the consequences of failure to do so. In these
12 circumstances, the policy favoring resolution of disputes on the
13 merits does not outweigh Petitioner's failure to obey court orders or
14 to file responsive documents within the time granted.

15 The fifth factor -- availability of less drastic sanctions --
16 also weighs in favor of dismissal. The court cannot move the case
17 toward disposition without Petitioner's compliance with court orders
18 or participation in this litigation. Petitioner has shown that he is
19 either unwilling or unable to comply with court orders by filing
20 responsive documents or otherwise cooperating in prosecuting this
21 action. Other possible sanctions for Petitioner's failures are not
22 appropriate with respect to a pro se litigant in custody.

23 Under these circumstances, dismissal for failure to prosecute is
24 appropriate. Such a dismissal should not be entered unless a litigant
25 has been notified that dismissal is imminent. See West Coast Theater
26 Corp. v. City of Portland, 897 F.2d 1519, 1523 (9th Cir. 1990). Here,
27 however, Petitioner was clearly warned about the possibility of
28 dismissal in the court's order to show cause, and failed to respond.

1 Under the circumstances it appears that giving further warning would
2 be futile.

3 **ORDERS**

4 **IT IS THEREFORE ORDERED** as follows:

5 1. This petition for writ of habeas corpus is dismissed,
6 without prejudice, for failure to prosecute.

7 2. The clerk shall enter judgment accordingly.

8 3. The clerk shall serve this order and the judgment herein on
9 Petitioner.

10
11 DATE: 12/26/11

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14 _____
JOSEPHINE STATON TUCKER
United States District Judge

15 Presented by:

16 Dated: November 21, 2011

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CARLA M. WOHRLE
United States Magistrate Judge